A

HO KOK LEONG

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ RAHIM JCA
ROHANA YUSUF JCA
ZAKARIA SAM JCA
[CRIMINAL APPEAL NO: B-05-176-07-2012]

C

3 APRIL 2014

CRIMINAL PROCEDURE: *Appeal - Conviction and sentence - Appeal against - Accused person charged for three offences of murder, attempted murder and for discharging gun shots with intention of causing*

D

death - High Court convicted accused person of charges - Accused person sentenced to imprisonment of five years and death - Appeal to court of appeal - Whether capital offence could be tried with any other offences - Whether evidence of science officer admissible - Whether charges were read properly - Whether there was breach of fundamental provisions of

E

Criminal Procedure Code - Penal Code ss. 302, 307 - Firearms (Increased Penalties) Act 1971, s. 3 - Criminal Procedure Code, ss. 163, 270, 399, 417, 41BA, 422

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The appellant was charged for three offences, namely (i) murder under s. 302 of the Penal Code; (ii) attempted murder under s. 307 of the Penal Code; and (iii) for discharging four gun shots with the intention of causing death to a police constable, an offence under s. 3 of the Firearms (Increased Penalties) Act 1971 ('FIPA'). At the conclusion of the trial, the trial judge convicted

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the appellant for the three charges and sentenced him to death for the first and third charges and five-year imprisonment for the second charge. Hence, the present appeal. The appellant argued that (i) a capital offence should not be tried with any other offences; (ii) the proceeding before the High Court was not

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translated to the appellant who spoke and understood Mandarin only; (iii) the evidence of the science officer was inadmissible because he was not a chemist; (iv) the transmission of the third charge under s. 11 of the FIPA by the Magistrate was wrong and *mala fide*; (v) there was a breach of fundamental provisions of the

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Criminal Procedure Code ('CPC') as the charges were not properly read to the appellant at the High Court and no plea to each charge was taken or recorded.

Held (dismissing appeal)
Per Zakaria Sam JCA delivering the judgment of the court:

(1) There was nothing in the CPC which prevents the charges being tried together as the alleged acts were clearly part of the same transaction and the case therefore fell within s. 165(1) of the CPC, an exception to s. 163 of the CPC. (para 11)

(2) The appellant was represented by a counsel and the appellant's interest was well taken care of. Section 270 of the CPC is clear. The second ground is only applicable where the appellant is unrepresented. (para 12)

(3) There was no merit in the appellant's argument regarding the admissibility of the evidence and report by the science officer. The Government Gazette P.U.(B) 324 dated 3 August 2004 places the science officer in the same class/category as the chemist for the purpose of s. 399 of the CPC. (paras 13 & 14)

(4) A direct transmission of a case by the Magistrate Court on its own volition to the High Court in respect of the third charge in this case, under s. 11 of the FIPA, was regular and could be done without any requisition or sanction under ss. 417 and 418A of the CPC. The language of s. 11 of the FIPA contains no ambiguity as to the power of the Magistrate to make such order. (para 15)

(5) The appellant had had the benefit of a full trial. From the notes of proceedings in the record appeal, all three charges were marked as exhibits and the prosecution had requested all the three charges to be read to the appellant. The record showed that all the three charges were read and plea recorded in that the accused claimed trial to all the three charges. Although there might be irregularity where the charges were read to the appellant but the plea was not taken on each charge, such irregularity was curable under s. 422 of the CPC. There was no failure of justice since the appellant was represented by a counsel throughout the proceedings and had undergone a full trial. (paras 16, 17 & 18)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh bagi tiga kesalahan, iaitu (i) bunuh di bawah s. 302 Kanun Keseksaan; (ii) percubaan bunuh di bawah s. 307 Kanun Keseksaan; dan (iii) melepaskan empat das tembakan dengan niat untuk menyebabkan kematian kepada seorang konstabel polis, satu kesalahan di bawah s. 3 Akta Senjata (Penalti Lebih Berat) ('FIPA'). Di penutup perbicaraan, hakim bicara mensabitkan perayu bagi ketiga-tiga pertuduhan dan menjatuhkan hukuman mati bagi pertuduhan pertama dan ketiga dan penjara lima tahun bagi pertuduhan kedua. Oleh itu, rayuan ini. Perayu menghujahkan bahawa (i) satu kesalahan yang membawa hukuman mati tidak seharusnya dibicarakan bersama-sama dengan kesalahan-kesalahan lain; (ii) prosiding di Mahkamah Tinggi tidak diterjemahkan kepada perayu yang bercakap dan memahami Mandarin sahaja; (iii) keterangan pegawai sains tidak boleh diterima kerana dia bukanlah ahli kimia; (iv) transmisi pertuduhan ketiga di bawah s. 11 FIPA oleh Majistret adalah khilaf dan *mala fide*; (v) terdapat pelanggaran peruntukan-peruntukan asas Kanun Tatacara Jenayah ('KTJ') kerana pertuduhan-pertuduhan tidak dibacakan dengan betul kepada perayu di Mahkamah Tinggi dan akuan setiap pertuduhan tidak diambil atau direkodkan.

Diputuskan (menolak rayuan)
Oleh Zakaria Sam HMR menyampaikan penghakiman mahkamah:

(1) Tiada apa-apa dalam KTJ yang menghalang pertuduhan-pertuduhan tersebut dibicarakan bersekali kerana perlakuan-perlakuan yang didakwa jelas dalam transaksi yang sama kes ini terjumlah di bawah s. 165(1) KTJ, satu pengecualian kepada s. 163 KTJ.

(2) Perayu diwakili oleh seorang peguam dan kepentingan perayu dijaga baik. Seksyen 270 KTJ adalah jelas. Alasan kedua hanya terpakai apabila perayu tidak diwakili.

(3) Tiada merit dalam hujahan perayu berkenaan kebolehterimaan keterangan dan laporan oleh pegawai sains. Gazette Kerajaan P.U.(B) 324 bertarikh 3 Ogos 2004 meletakkan pegawai sains dalam kelas/kategori yang sama dengan ahli kimia bagi tujuan s. 399 KTJ.

(4) Transmisi langsung bagi kes oleh Mahkamah Majistret atas kerelaannya, kepada Mahkamah Tinggi berkenaan pertuduhan ketiga dalam kes ini, di bawah s. 11 FIPA, adalah teratur dan boleh dilakukan tanpa sebarang perintah atau sekatan di bawah ss. 417 dan 418A KTJ. Bahasa s. 11 FIPA tidak mengandungi kesamaran mengenai kuasa Majistret untuk membuat perintah sedemikian.

(5) Perayu telah mendapat manfaat perbicaraan penuh. Daripada nota-nota prosiding dalam rekod rayuan, ketiga-tiga pertuduhan telah ditandakan sebagai ekshibit-ekshibit dan pihak pendakwaan telah memohon agar ketiga-tiga pertuduhan dibacakan kepada perayu. Rekod menunjukkan bahawa ketiga-tiga pertuduhan dibacakan dan akuan telah direkodkan dalam mana tertuduh mohon dibicarakan bagi ketiga-tiga pertuduhan. Walaupun mungkin terdapat ketidakaturan di mana pertuduhan telah dibacakan kepada perayu tetapi akuan tidak diambil bagi setiap pertuduhan, ketidakaturan tersebut boleh diperbetulkan di bawah s. 422 KTJ. Tiada kegagalan keadilan kerana perayu telah diwakili oleh peguam sepanjang prosiding dan telah melalui perbicaraan penuh.

Case(s) referred to:
Lim Sing Hiaw v. PP [1964] 1 LNS 92 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 163, 165(1), 270, 399, 417, 418A, 422
Firearms (Increased Penalties) Act 1971, ss. 3, 11
Penal Code, ss. 302, 307

For the appellant - Jagjit Singh (Yong Soon Ching with him); M/s Jagjit Singh & Co
For the respondent - Awang Armadajaya Awang Mahmud; DPP

[Editor's note: For the High Court judgment, please see Ho Kok Leong v. PP [2013] 1 LNS 1386.]

Reported by Najib Tamby

JUDGMENT

Zakaria Sam JCA:

[1] Three charges were preferred against the appellant.

[2] In case No. 45B-14-2011 the appellant was charged with the murder of Lee Fah, an offence under s. 302 of the Penal Code and punishable with death thereunder. The offence was alleged to have been committed on 28 June 2010 at about 6.45pm at a parking lot at Jalan SP2/6, Taman Serdang Perdana, Seri Kembangan, Selangor ('the first charge').

[3] In case No. 45-15-2011 the appellant was charged with the attempted murder of Police Constable Hosin bin Senawi, an offence under s. 307 of the Penal Code and punishable thereunder. He was alleged to have discharged four gun shots from a 9mm Stoeger Cougar 8000 pistol at the said police constable with intention to cause his death while attempting to evade arrest by the said police constable. The offence was alleged to have been committed on 28 June 2010 between 6.45pm to 7.30pm at Jalan SP2/2, Taman Serdang Perdana and Jalan Utama, Persiaran Serdang Perdana, Seri Kembangan, Selangor ('the second charge').

[4] In case No. 45-19-2012 the appellant was charged with an offence of discharging four gun shots from a 9mm Stoeger Couger 8000 pistol at Police Constable Hosin bin Senawi with intention to cause the death of the said police constable while committing a schedule offence ie, preventing his own arrest by the said police constable, an offence under s. 3 of the Firearms (Increased Penalties) Act, 1971 (Act 37) and also punishable with death thereunder. The offence was alleged to have been committed on the same date, time and place as particularised in case 45-15-2011 ('the third charge')

[5] At the request of the prosecution and with the consent of the defence, all the three charges against the appellant were tried together.

[6] At the conclusion of the trial the learned trial judge found the appellant guilty and convicted him of all three charges. He was sentenced to death in respect of the first and third charges. As regards to the second charge he was jailed for five years to run from the date of his arrest.

[7] Hence, this appeal.

[8] The facts of these cases are well set out in the judgment of the learned trial judge and we do not propose to repeat them here.

[9] The learned counsel for the appellant in this appeal raised six grounds: A

(i) A capital offence should not be tried with any other offences. In this case the appellant was charged with three offences to wit, an offence under s. 302 Penal Code ('PC'), an offence under s. 3 Firearms (Increased Penalties) Act ('FIPA') and an offence under s. 307 Penal Code. The offence under s. 302 and the PC offence under s. 3 FIPA carries death penalty. Whilst an offence under s. 307 carries a lesser punishment. The appellant was found guilty and convicted on all three offences after a full and joint trial of all the three charges and was sentenced accordingly. B C

(ii) The proceeding before the High Court was not translated to the appellant. It was argued that the appellant speaks and understand only Mandarin. On one occasion there was no Mandarin Chinese interpreter present in court during proceeding. D

(iii) The evidence of Pegawai Sains is inadmissible because he is not a chemist. E

(iv) No tendering of witnesses list that were offered to the accused after the close of prosecution case. (However during the hearing of the appeal, the appellant's counsel withdrew this ground of appeal). F

(v) The transmission of the third charge, under s. 11 FIPA by the Magistrate was wrong and *mala fide*.

(vi) The charges were not properly read to the accused/appellant at the High Court and no plea to each charge was taken or recorded. Therefore, there is a breach of fundamental provision of the Criminal Procedure Code ('CPC'). G

Analysis

[10] On the first ground, the learned counsel cited s. 163 CPC as the authority to argue that distinct offences should be tried separately as they involved different ingredients. H

[11] We found there is nothing in the CPC which prevented the charges being tried together as the alleged acts were clearly part of the same transaction and the case therefore fell within s. 165(1) CPC, an exception to s. 163 CPC: *Lim Sing Hiaw v. PP* [1964] 1 LNS 92; [1965] 1 MLJ 85 FC. I

[12] Similarly, with the second ground. We noted that the appellant was represented by counsel and we are of the view that the appellant's interest is well taken care of. Section 270 CPC is clear – that is, it is applicable only to situation where the accused or the appellant is unrepresented.

[13] With regard to the admissibility of the evidence and report by Pegawai Sains in this case, the learned DPP drew our attention to the Government Gazette P.U.(B) 324 dated 3 August 2004 which in our view places the science officer in the same class/ category as the chemist for the purpose of s. 399 CPC. For ease of reference, Gazette Notification P.U.(B) 324 of 2004 is reproduced below:

CRIMINAL PROCEDURE CODE

NOTIFICATION OF DECLARATION UNDER SUBSECTION 399(2)

In exercise of the powers conferred by paragraph 399(2)(f) of the Criminal Procedure Code [Act 593], the Minister declares that the Science Officers employed in the Chemistry Department, Malaysia and who prepare reports on any person, matter or thing referred to the Department for examination or analysis, is a class of person to whom the provisions of section 399 of the Criminal Procedure Code shall apply.

(2) The declaration under paragraph (1) shall apply to the Science Officers for the period that they remain employed in the Chemistry Department, Malaysia.

Dated: 3 August 2004
[KSTAS, 260.010/A002B Jil.3; PN (PU) 224/III]
DATO' MOHD RADZI SHEIKH AHMAD
Minister in the Prime Minister's Department

[14] We find no merit in the counsel's argument.

[15] As to ground no. (v), we are of the view that a direct transmission of a case by the Magistrate Court on its own volition to the High Court in respect of the third charge in this case, under s. 11 FIPA, is regular and can be done without any requisition or sanction under s. 418A and s. 417 CPC. The language of s. 11. FIPA contains no ambiguity as to the power of the Magistrate to make such order.

[16] On ground (vi), having considered the authorities cited to us by the learned counsel for the appellant, we noted that the cases cited to us are cases where the accused had pleaded guilty. Contrary to our case, the appellant had had the benefit of a full trial.

[17] We noticed from the notes of proceedings in the record of appeal that all three charges were marked as exhs. P1, P2 and P3 and that the learned DPP had requested all the three charges to be read to the appellant/accused. The record shows that all the three charges were read and plea recorded in that the accused claimed trial to all the three charges.

[18] On the facts of the present case, though there may be irregularity where the charges were read to the appellant/accused but the plea was not taken on each charge, we are of the view that the irregularity is curable under s. 422 of the CPC. We do not agree that there is a failure of justice, since the appellant/accused was represented by a counsel throughout the proceedings and had undergone a full trial.

Conclusion

[19] With that, we unanimously dismissed the appeal. The convictions and sentences of the learned trial judge are hereby affirmed.